

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC BELLS, LLC; BRUNSWIKST, LLC; and WOW DISTRIBUTING, INC., on their own behalf and on behalf of similarly situated employers,

and

MELISSA JOHNSTON; LENA MADDEN; JUDI CHAPMAN; KATHERINE SOLAN; JOHN EDMUNDSON; and MIKE LINDBO, individuals on their own behalf and on behalf of similarly situated employees,

Class Plaintiffs,

v.

JAY INSLEE, in his capacity as Governor of the State of Washington; CAMI FEEK, in her capacity as the Commissioner and Chief Executive Officer of the Washington Employment Security Department; DONALD CLINTSMAN, in his capacity as the Acting Secretary of the Washington Department of Social and Health Services; and THE LONG-TERM SERVICES AND SUPPORTS TRUST FUND, an employee benefit plan,

Defendants.

No. 2:21-cv-01515-TSZ

PLAINTIFFS' SUPPLEMENTAL BRIEF

This Supplemental Brief addresses the four issues raised by the Court.

(A) Which party bears the burden of establishing the number of individuals against whom Long-Term Services and Supports Trust Program (also known as "WA Cares") premiums will be assessed?

1 Defendants raised the Tax Injunction Act (TIA) as a defense to Plaintiffs' claims.
 2 Accordingly, Defendants have the burden of proof for facts necessary to resolve that defense.

3 At present, Defendants raise the TIA as part of a facial challenge on a motion to dismiss.
 4 In that context, the Court must draw all reasonable inferences in favor of Plaintiffs and accept
 5 Plaintiff's factual allegations in the Complaint as true. *See Wolfe v. Strankman*, 392 F.3d 358,
 6 362 (9th Cir. 2004). In addition, as Defendants raised a facial challenge in their motion to
 7 dismiss with no factual numbers, Plaintiffs have no additional burden to produce evidence.

8 **(B) How many individuals are (i) anticipated to be subject to WA Cares premiums on or**
 9 **after July 1, 2023; (ii) expected to be exempt as of July 1, 2023; (iii) have already applied or**
 10 **are expected to apply for exemption from the assessment of WA Cares premiums for each**
 11 **of the potential reasons set forth in RCW Chapter 50B.04 and Laws of 2022, ch. 2, § 2;**
 12 **(iv) self-employed in Washington; and (v) predicted to elect coverage pursuant to RCW**
 13 **50B.04.090?**

14 At this stage of the litigation, where the parties are still engaged in discovery, Plaintiffs
 15 can offer only preliminary answers to some of these questions based on information and
 16 documents provided by Defendants. Plaintiffs believe that answers to these questions will
 17 become clearer after the parties have had a full opportunity to complete discovery.

18 (i) More than 3.277 million individuals are anticipated to be subject to WA Cares
 19 premiums on or after July 1, 2023. In the December 14, 2020, Milliman Report, the actuarial
 20 study commissioned by the Office of the State Actuary to provide an actuarial analysis of WA
 21 Cares, the estimated number of "Vested Individuals" as of 2025 is 3,277,000. Declaration of
 22 Richard Birmingham ("Birmingham Decl."), Ex. A, 43-44. According to the report, a "Vested
 23 Individual" is an employee that has paid into WA Cares for three years, which would require an
 24 individual began paying into WA Cares in 2022.¹ Birmingham Decl., Ex. A, 35. Since
 25 additional employees beyond those "Vested Individuals" will be paying into WA Cares (e.g.
 26 employees who are not yet "vested"), Plaintiffs posit that the number of individuals anticipated
 27 to be subject to WA Cares premiums on July 1, 2023, is necessarily more than 3.277 million.

¹ Recent legislation delayed implementation until 2023, which the December 2020 Milliman Report does not consider. However, for purposes of estimating the number of people likely subject to the program, Plaintiffs believe these figures still provide a reliable estimate.

(ii) Plaintiffs do not have a clear answer to the total number of individuals who may be exempt as of July 1, 2023. Plaintiffs have information regarding the following exemptions, but additional discovery will be required to ascertain the total number of employees that may be exempted (particularly for recently-passed exemptions):

- Exemption applications approved by ESD: 470,442 (as of January 20, 2022), Birmingham Decl., Ex. B, 20 (Defendants' Response to Interrogatory No. 8).
- Residents of border states working in Washington: approximately 150,000, Birmingham Decl., Ex. C, 6 (noting that approximately 150,000 out-of-state residents would have been required to pay WA Cares premiums beginning in 2022, and "affect[ing] more in the decades to come).
- Other exemptions: Plaintiffs do not have information regarding the number of additional individuals who may be exempted under other exemptions to WA Cares. Plaintiffs believe additional discovery could clarify those numbers.

(iii) As of September 30, 2021, ESD projected it would receive 311,000 applications for exemptions. As of January 20, 2022, ESD had actually received 474,265 applications. And as of January 20, 2022, ESD had approved 470,442 applications. (3,823 applications remain not approved as of January 20, 2022.) Birmingham Decl., Ex B, 19-20 (Defendants' Response to Interrogatory No. 8).

(iv) Plaintiffs believe Defendants are in a superior position to provide evidence about the number of self-employed individuals in Washington. Again, discovery is ongoing and Plaintiffs believe the answer to this question will be clearer with time to conduct additional document discovery and send supplemental interrogatories.

(v) As with (iv), above, Plaintiffs believe Defendants are in a superior position to provide evidence about the number of self-employed individuals predicted to elect coverage pursuant to RCW 50B.04.090.

(C) Whether, in light of Laws of 2022, ch. 2, § 2, the claims of plaintiff Melissa Johnston, who resides in Eagle Point, Oregon, but apparently works in Washington, and who is now

1 **eligible for an exemption from WA Cares premiums, should be dismissed with prejudice**
 2 **for lack of standing and/or on the merits?**

3 Plaintiffs agree that the subset of the right to travel/Equal Protection Clause/Privileges
 4 and Immunities Clause claim asserted by out-of-state residents who are working in Washington
 5 is now moot. Plaintiffs' proposed amended complaint will withdraw those claims.

6 Melissa Johnston is still an appropriate party to this action. Ms. Johnston was born after
 7 January 1, 1968, and may move to the State of Washington within ten years of retirement. If she
 8 moves to Washington within ten years of retirement and does not contribute for ten years, her
 9 benefit will be forfeited. Similarly situated older individuals who reside in other states and move
 10 to Washington later in their career will have a similar forfeiture. Plaintiffs intend to clarify these
 11 allegations in their proposed amended complaint.

12 **(D) Whether WA Cares meets the definition of an “employee benefit plan,” as defined**
 13 **by the Employee Retirement Income Security Act; see 29 U.S.C. §§ 1002(1)–(3) (requiring**
 14 **that an “employee benefit plan” be “established or maintained by an employer or by an**
 15 **employee organization or by both”); see also 29 U.S.C. §§ 1002(4)&(5) (defining**
 16 **“employer” and “employee organization”)?**

17 WA Cares is an employee welfare plan in that it provides medical benefits and benefits in
 18 the event of sickness, accident, and disability. RCW 48.83.020(5) defines long-term care
 19 insurance as a policy, practice, or program that provides coverage for one or more medically
 20 necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care
 21 services, provided in a setting other than an acute care unit of a hospital. Given the statutory
 22 definition and the requirement that the recipient must be unable to perform certain basic
 23 activities of daily living, there is little doubt that some of the care a recipient receives is medical
 24 care, as the statute specifically provides for reimbursement of professional services, nursing
 25 home services, assisted living services, and memory care. RCW 50B.04.010(2). *Schneider v.*
 26 *UNUM Life Ins Co. of Am.*, 149 F. Supp. 2d 169, 175-76 (E.D. Pa. 2001) (holding that union-
 27 sponsored long term care to be an ERISA welfare benefit plan providing medical, surgical, or
 benefits in the event of sickness). Also, under federal law, long term care, including long term

1 care that is maintained by a State, is classified as a health insurance contract and, thus, a welfare
2 plan. *See* 26 U.S.C. §§ 7702B(a)(1), 7702B(f).

3 ERISA covered plans must be established or maintained by the employer, or an employee
4 organization, or both. 29 U.S.C. § 1003(a)(1)-(3). In the instant case, WA Cares is established
5 and maintained by the State for its employees as all State of Washington employees are eligible
6 to participate. In *Howard Jarvis Taxpayers Association v. California Secure Choice Retirement*
7 *Savings Program*, 997 F.3d 848, 860 (9th Cir. 2021), the CalSavers IRA program was
8 established or maintained by the state, but not as an employer since its employees were not
9 eligible to participate in the program. *Id.*, Cal. Gov't. Code § 100000(c)(1), (d) (CalSavers is
10 required for employers who did not maintain a retirement plan and the state of California, of
11 course, maintains a retirement plan, CalPers, for its employees). In contrast, Washington State
12 employees are required to participate in WA Cares, so under *Howard Jarvis* the state has
13 established and maintained a plan as an employer for its employees.

14 Despite the fact that the WA Cares is established and maintained by the State for its
15 employees, WA Cares is not exempt from ERISA as a governmental plan. 29 U.S.C.
16 § 1003(b)(1). The governmental plan exemption applies only if the plan is maintained by the
17 state **only** for its employees and not for employees in general. 29 U.S.C. § 1002(32). If there is
18 more than a *de minimis* participation by non- state employees, the governmental exemption does
19 not apply. U.S. DEP'T. OF LABOR ADVISORY OP. 2012-01A, April 27, 2012² (a plan that covers a
20 substantial number of private employees as well as governmental employees is not a
21 Governmental Plan); U.S. DEP'T. OF LABOR ADVISORY OP. 95-27A, Nov. 8, 1995³ (if a benefit
22 arrangement is extended to more than a *de minimis* number of private employees the
23 governmental exemption is lost). *See also Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d
24 221, 229 (2008) (governmental exemption will apply when only a *de minimis* number of private
25 employees are included in the Plan).

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27 ² <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2012-01a>.

³ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1995-27a>.

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2 DATED this 31st day of March, 2022.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on March 31, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 31st day of March, 2022.



Susan Bright